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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JEFFREY M. MASSON,

Petitioner,

—v.—

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC., and JANET MALCOLM,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. AND MAGAZINE PUBLISHERS OF AMERICA, INC., AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

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STATEMENT

The Association of American Publishers, Inc. and Magazine Publishers of America, Inc. (collectively referred to as "*amici*") submit this joint brief *amici curiae*, pursuant to Rule 37 of the Rules of the Supreme Court of the United States, urging affirmance of the judgment of the court below. The written consents of the parties to the filing of this brief have been obtained and are being filed with the clerk of this Court.

THE *AMICI*

The Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its over two hundred members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP's members publish works which run the gamut of published materials, including nonfiction, biography, history and fiction.

The Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership 218 magazine publishers who publish 846 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

The *amici* both represent segments of the publishing industry, and accordingly, this brief will focus on the issues in this case of greatest relevance to publishers, as distinguished from other participants in the creation of First Amendment materials. The parties predominantly have focused their submissions on the allegations that Janet Malcolm, the writer, made a series of libelous statements by misquoting the plaintiff, and therefore the parties have dealt only briefly with the libel charges lodged against the magazine and book publisher of Malcolm's work. Accordingly, this *amicus* submission aims to examine in greater detail plaintiff's case against the two publishers and the standards that properly may be imposed upon publishers without unduly limiting the free flow of speech.

INTEREST OF THE *AMICI* AND SUMMARY OF ARGUMENT

Amici submit this brief in order to express their views, on behalf of their members, of the potentially devastating impact of an unduly broad-sweeping decision in this case upon the general development of libel law, a body of law under which their members function every day. Unfortunately, at the present juncture, legal process appears more to have obscured the facts of this case than to have laid them bare. As now framed, the case is focused upon the hypothetical conduct of Janet Malcolm—the courts having assumed, for the purposes of summary judgment, that her notes of some of Jeffrey Masson's remarks were "fabricated" and that several quotes in her article therefore are clumsy alterations of the words spoken by Masson as reflected on various audio tapes. This posture lends itself to grand pronouncements in a vacuum, pronouncements which the *amici* fear will lead to improper limitation of the free flow of speech in situations not presently before the Court.

The key question in this litigation has never been whether it is proper purposely to fabricate quotes. Janet Malcolm denies having deliberately altered the quotations at issue in any substantive way, and the editorial practices of *The New Yorker Magazine, Inc.* ("*The New Yorker*") and Alfred A. Knopf, Inc. ("Knopf"), as well as others in the industry, do not embrace the substantive alteration of quotes. *Amici* are opposed to the bald fabrication of quotes as a matter of journalistic practice; they condone only the minor and commonplace changes employed to make sentences more understandable and coherent, while preserving the speaker's meaning.

The propriety of altering quotes is, *amici* submit, not the relevant issue. The appropriate inquiry is to determine what evidence should be sufficient to sustain a libel action for allegedly inaccurate quotes in light of the impact of the applicable standard on the writer and the publisher in the daily practice of their craft. In various ways, the standards

advanced by plaintiff would force writers and publishers to be absolute guarantors of the accuracy of quotes—to be stone-cold positive about them—a burden which would unquestionably bring to a grinding halt the free flow of speech.

With respect to the two publishers, *The New Yorker* and Knopf, plaintiff falls far short of the evidence required under prevailing case law to uphold a finding of actual malice. Masson's argument regarding *The New Yorker* is essentially that, having learned in the context of a pre-publication fact-check of four minor and nondefamatory mistakes *unrelated to the alleged libels* in a very lengthy article by a respected writer, the magazine publisher must have had subjective doubts as to the accuracy of the unconnected passages at issue. Masson's proposed rule would essentially require that, once a handful of insignificant errors are discovered, a publisher would have to assume the role and responsibilities of the writer and re-check everything, from beginning to end, with the direct sources or source material. Plainly, this is an onerous burden which publishers could not sustain and which would severely contract the number of publications available to the public. Moreover, this would entail a dramatic change in long-standing, real world practice.

As for its claim against Knopf, plaintiff essentially argues that even the vaguest threat of a libel action necessitates substantial verification, even where the book publisher is merely reprinting a work of a known and reliable writer, which was previously published by a respected publisher. Critically, there is no evidence in the record of any *written* communication to either *The New Yorker* or Knopf stating that the articles were libelous, or any oral communication in which *specific* passages were identified as incorrect, after the articles were published and prior to the book's publication. Moreover, Masson's half-hearted threats came from an individual who was known from Malcolm's writings to be litigious and accusatory. In these circumstances, Knopf had no "obvious reasons" to suspect falsity, and thus its judgment to rely upon a respected writer and publisher rather than investigate

further cannot, as a matter of law, form the basis for liability.[1] As stated in an analogous case: "The threat of a libel suit by [plaintiff] might well give a publisher pause, but it would not necessarily lead it to doubt the truthfulness of its article or its sources."[2] Masson himself makes the startling admission that, while Knopf knew of his accusations, Masson does not believe that the publisher believed his charges of inaccuracy to be true, but rather trusted Janet Malcolm. (J.A. 248).

In this context it is important to remember that publishers of substantial size often receive a steady stream of accusations of falsity or libel, almost always in situations where the information imparted is unflattering but, in fact, accurate. "If potential plaintiffs in libel suits could cut off a malice defense simply by calling a newspaper and giving a broad denial of an article, the first amendment policy embodied in *New York Times* would be undermined." *Martin Marietta Corp.* v. *Evening Star Newspaper*, 417 F. Supp. 947, 960 (D.D.C. 1976) (summary judgment granted to newspaper despite the fact that plaintiff informed newspaper that article was false in between printings of earlier and later editions).

The unusual hypothetical analysis in this case raises two further concerns for *amici*. First, it is absolutely critical that potential plaintiffs in future litigations not be able to thwart motions for summary judgment by authors and publishers based primarily on the facile allegation that an author's notes are fabricated. Were the simple, easy-to-make charge of fabrication, without more, sufficient to lead courts to treat an author's notes as a nullity, at best, almost every innocent author and publisher could be forced to endure the arduous burdens of trial. Moreover, the threat of such an allegation would be held over the collective heads of authors and pub-

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1 *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S. Ct. 2678, 2696 (1989).

2 *Reader's Digest Ass'n* v. *Superior Court*, 37 Cal.3d 244, 260, 690 P.2d 610, 620, 208 Cal. Rptr. 137, 147 (1984) (In Bank), *cert. denied*, 478 U.S. 1009 (1986).

lishers by many a subject seeking to squelch an unfavorable portrait—thus chilling many such publications. The principles of *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986), dictate that a mere denial of the accuracy of notes should not be sufficient for a court to adopt the assumption of fabrication for purposes of summary judgment, and that plaintiffs must adduce additional evidence sufficient to establish that the notes are, in fact, fabricated.

Finally, *amici* encourage the Court to adopt the incremental harm analysis as applied by the Second Circuit in *Herbert* v. *Lando*, 781 F.2d 298, 310-12 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986). Thus, "statements—even those that might be found to have been published with actual malice—should not be actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery." *Herbert*, 781 F.2d at 312. Plaintiff's acknowledged quotations are so colorful that the alleged embellishments essentially do no more than reinforce the prevalent themes in the article and are not so far from the "truth" as to be worthy of a libel judgment.

ARGUMENT

I.

PLAINTIFF HAS NOT MET HIS BURDEN OF SHOWING ACTUAL MALICE AS TO THE TWO PUBLISHERS

A. Introduction

The evidence gathered by plaintiff with respect to the actions of *The New Yorker* and Knopf falls far short of establishing the presence of constitutional malice under controlling case law. In cursory fashion, Masson argues that the two publishers proceeded in reckless disregard of the truth by failing to "take the time to review the tapes" despite the fact that, in the case of *The New Yorker*, it had knowledge of a few nondefamatory mistakes, and in the case of Knopf, it

had knowledge of a vague threat of a libel action. Brief for Petitioner ("Ptnr. Br.") at 21. Masson's sole authority for this proposition is an analogy to *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S. Ct. 2678 (1989) (hereinafter "*Harte-Hanks*"), which he claims holds that "such 'purposeful avoidance of the truth' would constitute actual malice." Ptnr. Br. at 21. The facts of *Harte-Hanks*, however, are radically different from those before the Court. *Harte-Hanks* reaffirms the long-standing principle that "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." 109 S. Ct. at 2696. *Harte-Hanks* requires further investigation only where " 'there are *obvious reasons* to doubt the veracity' " of the informant or information. *Id.*, quoting *St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968) (emphasis added).

Courts rightfully have been leery of claims based on failure to investigate further, both because such decisions by publishers often are based on a natural division of labor and faith in the author, rather than subjective awareness of falsity, and because judicially imposed burdens on publishers of additional verification would narrow the sphere of information available to the public. A review of the applicable standards makes plain that Masson's claims against *The New Yorker* and Knopf should be dismissed, and that the standards Masson seeks to impose on publishers are unworkable and detrimental to a robust press.

B. The Prevailing Standards Require Subjective Awareness of Probable Falsity.

The First Amendment prohibits recovery for defamation unless a plaintiff proves with "convincing clarity" that a false "statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80, 285-86 (1964). To survive a motion for summary judgment, there must be clear and convincing evidence from which a reasonable jury might find

that actual malice had been shown with convincing clarity. *Anderson*, 477 U.S. at 257.

As emphasized in numerous opinions authored by this Court, "[t]he [actual malice] standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity.' " *Harte-Hanks*, 109 S. Ct. at 2696, quoting *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964). The inquiry is not whether a publisher has satisfied the standard of the reasonable or prudent publisher, but rather whether "the defendant *in fact* entertained serious doubts as to the truth of the publication." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968) (emphasis added); *see also Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974). The falsity must be "brought home to" the publisher. *New York Times Co.*, 376 U.S. at 287.[3]

Accordingly, a claim that a defendant failed to investigate before publishing is relevant only to the extent that it reflects on the subjective attitude of the publisher. *Reader's Digest Ass'n* v. *Superior Court*, 37 Cal.3d 244, 690 P.2d 610, 619, 208 Cal. Rptr. 137, 145-46 (1984), *cert. denied*, 478 U.S. 1009 (1986).[4] As stated above, under *Harte-Hanks* and its predecessor cases, including *St. Amant*, failure to investigate further is probative of a subjective awareness of falsity only where " 'there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' " *Harte-Hanks*, 109 S. Ct. at 2696, quoting *St. Amant*, 390 U.S. at

3 The Court has adopted a subjective standard even though some erroneous publications thereby may receive protection, in recognition of the fact that "the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies." *St. Amant*, 390 U.S. at 731-32.

4 *See also New York Times Co.*, 376 U.S. at 263, 287 (no actual malice even where information demonstrating falsity of the allegations available in the *Times'* own files, since editorial staff was unaware of these articles).

732. There must be clear and convincing evidence that the defendant's "inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the source's] charges." *Harte-Hanks*, 109 S. Ct. at 2698.[5]

C. No Liability May Be Imposed Upon *The New Yorker*.

1. The Discovery Of A Few Minor Errors During Fact-Checking Does Not Lead To A Duty To Investigate Further, Including Any Obligation To Verify Quotes.

The uncontroverted record evidence indicates that, even assuming for the sake of argument that Malcolm altered quotations and that such alterations were defamatory, *The New Yorker* did not know that the specific quotations were false, or act with reckless disregard as to their particular truth or falsity. *The New Yorker* relied on a writer with an outstanding reputation, followed its ordinary procedures in verifying facts contained in the article, had no reason to suspect that the article contained any defamatory material, and had no indication that the alleged libelous statements in particular might be inaccurate.

The New Yorker was entirely justified in relying on the work of Malcolm, a well-respected, reliable author. At the time the article was published, Malcolm had been a professional journalist for almost 20 years, writing primarily for *The New Yorker*. She also had written for *The New Republic*, *The Nation*, and the *New York Review of Books*.

5 Other courts, such as the District of Columbia Circuit, have articulated similar standards: "[A] rule requiring verification in the absence of evidence that the publisher had *good reason to suspect falsity* would curtail substantially a protected form of speech." *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 972-73 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (emphasis added); *see also Weiner* v. *Doubleday & Co.*, 74 N.Y.2d 586, 595, 549 N.E.2d 453, 457, 550 N.Y.S.2d 251, 255 (1989), *cert. denied*, 110 S. Ct. 2168 (1990) ("without '*substantial reasons*' to doubt the accuracy of the material or the trustworthiness of its author, a publisher is entitled to rely on the research of an established writer.") (emphasis added).

Malcolm had prior expertise in writing about psychoanalysis, the subject at issue in the article, having previously published a two-part article on the profession in *The New Yorker*, which later became a book published by Knopf. (J.A. 47). Moreover, *The New Yorker* editors were aware that Malcolm had conducted extensive recorded interview sessions with Masson. (J.A. 223).

Reliance on the professional reputation of an author is a strong factor in defeating an allegation of actual malice. *See, e.g., Marcone* v. *Penthouse International Magazine for Men*, 754 F.2d 1072, 1089 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985); *Reader's Digest Ass'n*, 690 P.2d at 619, 208 Cal.Rptr. at 146; *Weiner* v. *Doubleday & Co.*, 74 N.Y.2d 586, 595, 549 N.E.2d 453, 459, 550 N.Y.S.2d 251, 255 (1989) ("without 'substantial reasons' to doubt the accuracy of the material or the trustworthiness of its author, a publisher is entitled to rely on the research of an established writer"); *Martin Marietta Corp.*, 417 F. Supp. at 959 (newspaper entitled to rely on reporter "of proven reliability").[6]

The New Yorker also followed its customary fact-checking procedure. Specifically, a *New Yorker* fact-checker undertook to check the reviewable facts contained in the article, including, as is *New Yorker* policy, facts contained within quotations, although not the words of the quotes themselves. To its credit, *The New Yorker* devotes significant resources to fact-checking and, indeed, is known to have "set a kind of standard for factual accuracy." *See Masson* v. *The New Yorker Magazine, Inc.*, 895 F.2d 1535, 1569 (9th Cir. 1989) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990).

Masson bases his libel arguments on a conversation between Masson and a *New Yorker* fact-checker prior to publication of the article during which Masson identified four alleged errors. Ptnr. Br. at 47; J.A. 66-67. In addition, Masson claims that *The New Yorker* declined to accede to a request he made in that conversation that all quotes be verified with him. Ptnr. Br. at 47; J.A. 66-67. *The New Yorker* unequivocally denies that Masson asked that all quotes be verified with him. (J.A. 247).

6 As in *Marcone*, publishers are permitted to place considerable reliance on a contributor even where the individual is a free-lance writer who has had only limited contact with the publisher. 754 F.2d at 1089. In comparison, *The New Yorker* clearly was entitled to rely on Malcolm, a long-time contributor of proven reliability.

Masson's allegations are not probative of actual malice. None of the alleged errors that Masson identified were related in any way to the alleged defamatory quotations at issue; none were defamatory; and all were insignificant errors unrelated to the central points of the article. At least one of the alleged errors was not even incorrect. Masson charges that he was asked to verify that his ex-wife is "Polish," and had to inform the fact-checker that she is, in fact, "a Jew from Poland." (J.A. 66). The addition of the woman's religion, while more complete, does not render incorrect the statement of her nationality.[7]

The fact that *The New Yorker* was notified during a responsible pre-publication fact-check of four insignificant inaccuracies, completely unrelated to the alleged libelous statements, in a 48,500 word publication does not show in the slightest that the *alleged libelous statements* were published with any subjective doubt with regard to their truth—much less "serious doubts." *St. Amant*, 390 U.S. at 731. Plaintiff's attempt to leap from knowledge of four minor nondefamatory errors to subjective doubt about the entire article is unsupported by prevailing case law. On the contrary, such "isolated instances of inaccuracy . . . cannot be accorded significance, since the relevant rule of law contemplates that 'erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the breathing space they need to survive.' " *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 971-72 (D.C.

7 The other three alleged errors to which Masson alerted *The New Yorker* during his conversation with the fact-checker were: 1) that Masson had not gotten his ex-wife interested in psychoanalysis, but rather that she was in analysis when Masson met her; 2) that his father was not from Bessarabia, but rather Bukhara; and 3) that Dr. Eissler did not return Masson's letters unopened. (J.A. 66-67).

Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (hereinafter "*Keogh*"), quoting *Garrison*, 379 U.S. at 74. Only in instances of "persistent inaccuracy" does a publisher have reason to be suspicious. *Martin Marietta Corp.*, 417 F. Supp. at 959-60, citing *Keogh*, 365 F.2d at 971.

Moreover, there was nothing "inherently improbable" in the alleged libelous quotations. *St. Amant*, 390 U.S. at 732. Rather, there was no reason for *The New Yorker* to harbor any suspicions where, as here, the alleged misquotations were completely consistent with the general tenor of the article.

The fact that *The New Yorker* declined to verify all quotes with Masson, as allegedly requested, is also not probative of actual malice. Absent persistent inaccuracy, and thus an obvious reason to be suspect, *The New Yorker* was under no obligation to verify the quotes. *St. Amant*, 390 U.S. at 732-33. Moreover, *The New Yorker* was acting in conformity with its customary policy not to verify the accuracy of the precise words—as opposed to the facts—contained in each quotation. This policy is completely supportable. Verification of the precise words of each quote would involve an enormous expenditure of time and money. Even if attempted, it would be virtually impossible to verify quotations with speakers, who are unlikely to recall the precise words spoken in an earlier conversation. Moreover, speakers undoubtedly would be tempted to deny quotations that place the speaker in an unfavorable light.

As plaintiff would have it, any time a publisher were to find a few mistakes, the publisher would be obligated to retrace all of the author's research, regardless of the length of the article or the insignificance of the inaccuracy. In urging this onerous standard, plaintiff ignores the realities of the publishing industry—whether book, magazine or newspaper. Publishers simply cannot sustain the significant financial burden which would result from the necessity extensively to fact-check the vast quantities of materials which would require verification under plaintiff's proposed standard. As the D.C.

Circuit has stated in language applicable to magazine and book publishers:

> Verification is also a costly process, and the newspaper business is one in which economic survival has become a major problem, made increasingly grave by the implications of this fact for free debate. We should be hesitant to impose responsibilities upon newspapers which can be met only through costly procedures or through self-censorship designed to avoid the risks of publishing controversial material.

Keogh, 365 F.2d at 972.

Ironically, the imposition of a duty to check all facts and quotes upon learning of insignificant inaccuracies would lead publishers not to check manuscripts at all. *See Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113, 120 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977) ("The appellees would punish the *Times* for its effort to confirm the story, apparently maintaining that a little prudence is a dangerous thing"). There is no convincing, realistic basis to impose further responsibilities of verification after the discovery of minor errors, where this Court did not even require the *New York Times* in *New York Times Co.* v. *Sullivan* to check its own files, which contained the *Times'* own published articles demonstrating the falsity of the allegation asserted. *See New York Times Co.*, 376 U.S. at 263; *see also Keogh*, 365 F.2d at 972.

2. This Case Is Disposed Of By Case Law Indicating That Quotations Do Not Have To Be Reviewed With An Interviewee And Is Readily Distinguishable From *Harte-Hanks*.

Well-established case law specifically supports *The New Yorker's* position that a publisher is not obligated to review or verify a publication with the subject of the publication. *St. Amant*, 390 U.S. at 730; *Reader's Digest Ass'n*, 37 Cal.3d at 259, 690 P.2d at 619, 208 Cal.Rptr. at 146. A plaintiff cannot prove actual malice merely by asserting that a publisher

failed to contact the subject of his work or verify the subject's statements. *St. Amant*, 390 U.S. at 730; *Davis* v. *Costa-Gravas*, 654 F. Supp. 653, 657 (S.D.N.Y. 1987); *Loeb* v. *New Times Communications Corp.*, 497 F. Supp. 85, 92-93 (S.D.N.Y. 1980). In a case dealing with the very issue presented here, *James* v. *Gannett Co.*, 40 N.Y.2d 415, 423, 353 N.E.2d 834, 840, 386 N.Y.S.2d 871, 877 (1976), the New York Court of Appeals considered whether actual malice existed where the plaintiff alleged that she had been misquoted and the reporter and defendant newspaper had " 'deliberately refused to allow plaintiff to review said article and pictures.' " The court rejected the plaintiff's argument and stated:

> A requirement that persons mentioned in proposed newspaper accounts or articles be permitted a first instance, prepublication review, including a review of direct quotations, would, in effect, impose the equivalent of censorship traditionally anathema in our society. Outsiders have no right to sit in the editor's chair; to insist that an interviewee should be assured an opportunity with the benefit of reflection and hindsight to revise spontaneous statements would be equally to strike at the vitality of news reporting.

James, 40 N.Y.2d at 423-24, 353 N.E.2d at 840, 386 N.Y.S.2d at 877. The court soundly rejected the suggestion that a refusal to verify quotations and other facts with a plaintiff evidences actual malice:

> Publications establish their own method of verifying information and the fact that the subject of an article was not offered, prior to publication, an opportunity for review and comment does not, by itself, establish that the publisher acted maliciously or recklessly. Only where the publisher has, or should have had, reasons to doubt the accuracy of the report or its reporter is there a legal duty to make further inquiry . . . . In other words, it must be established that there were obvious reasons to doubt the veracity of the report.

James, 40 N.Y.2d at 424, 353 N.E.2d at 841, 386 N.Y.S.2d at 877. Plaintiff cites no authority to the contrary.

Plaintiff's effort to squeeze within the rubric of *Harte-Hanks* and argue that "Malcolm's publishers were guilty of 'purposeful avoidance of the truth' " is unavailing. Ptnr. Br. at 47, quoting *Harte-Hanks*, 109 S. Ct. at 2698. The sharply contrasting facts of *Harte-Hanks*, as compared with the case at bar, demonstrate soundly that *The New Yorker's* conduct does not qualify as the type of willful blindness that *Harte-Hanks* sought to address.

The plaintiff in *Harte-Hanks*, a candidate for a municipal judgeship, charged that the defendant newspaper purposely avoided learning whether, as was reported, he in fact offered inducements to two citizens to provide information about the alleged bribery of a member of the incumbent judge's staff. This Court affirmed a jury verdict for the plaintiff, finding that several pieces of evidence, considered cumulatively, provided clear and convincing evidence of actual malice. The evidence included: 1) the newspaper's choice "not to interview the one witness who was most likely to confirm" the reported incident, despite the fact that six other witnesses denied the reported charges; 2) the newspaper's decision not to listen to four hours of audio tapes of the actual conversation in which plaintiff was alleged to have committed his wrongful acts; 3) the newspaper's earlier editorial foreshadowing the charges which could "be taken to indicate that [the editor] had already decided to publish [the] allegations, regardless of how the evidence developed"; and 4) a finding that the most serious charge was "highly improbable," and inconsistent with other undisputed facts. *Harte-Hanks*, 109 S. Ct. at 2693-94, 2697.

The facts of this case bear no resemblance to those in *Harte-Hanks*. The reporters in *Harte-Hanks* failed to attempt to contact the key player alleged to have been offered the inducements, relying instead on her sister's version of the incident which was contradicted by six other witnesses. Here, Malcolm had indeed spoken to Masson, and there were no

conflicting accounts of a central event for the magazine to sort out. In fact, there had been no indication at all that the quotations now alleged to be fabricated were inaccurate.

In this context, the tapes in *Harte-Hanks* provided an obvious means substantially to resolve the conflicting accounts of the incident the reporters had gathered. The tape was in effect the newspaper's entree into an event at which none of its reporters was present. By contrast, the tapes at issue here are a reporter's own tapes of her own interviews. *The New Yorker* would only be referring to them as a means of double-checking and duplicating the work of a respected writer, not as a source of new information.

Additionally, the newspaper in *Harte-Hanks* was adjudged reckless for failing to solicit the most basic of information from the key witness, not for failing to verify the precise words used during many hours of conversation. Of note, the tapes in *Harte-Hanks* spanned four hours, while Malcolm's tapes span between 40-50 hours. Verifying the Masson quotes against the tapes would have been an absolutely enormous undertaking, which likely would have consumed at least two or three times the hours of the tapes themselves.

Viewing the facts as a whole, this Court concluded in *Harte-Hanks* that "the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the source's] charges." 109 S. Ct. at 2698. *The New Yorker* cannot logically be viewed as seeking to avoid the truth pertaining to the alleged libels when it had *no* knowledge of any conflicting version or viewpoint with regard to those statements. Moreover, any such inference of purposeful avoidance of the truth is specifically negated by the fact that *The New Yorker* acted in conformity with its customary policy of checking facts, but not verifying the precise words, contained in quotes. In sum, the application of *Harte-Hanks* to the case at bar would entail a radical extension of that case, which would significantly impair the free flow of speech.

3. A Publisher Known For Accuracy Cannot Be Held To A Higher Standard Under The Subjective Test Of Actual Malice.

In his dissenting opinion below, Judge Kozinski espouses the erroneous and harmful theory that *The New Yorker* should be judged by a higher-than-customary standard since it commits substantial resources to fact-checking and therefore is well-known for factual accuracy. The dissent reasons that by giving assurances of its accuracy to the reading public, "*The New Yorker* has induced a reasonable expectation of accuracy in the minds of sources and readers," thus encouraging sources to speak without reservation and readers to "accept at face value the quotes they read in *New Yorker* articles." 895 F.2d at 1569.

This theory conflicts with the clear direction of this Court, discussed above, that the actual malice test focuses upon subjective state of mind, not objective standards, whether self-created or judicially imposed. The dissent would not have a judge or jury consider whether *The New Yorker* in fact entertained serious doubts as to the truth of a statement, but rather whether *The New Yorker*, a publication with a stellar reputation for accuracy, should have known that a particular statement was false. No support is given for this novel theory.

Nor does the dissent attempt to justify the disincentive for publishers to maintain high standards of accuracy which necessarily would result from its proposed analysis. Very simply, a publisher will not be eager to earn a reputation for reliability and accuracy if it knows that its efforts will work against it in a libel suit. Under the dissent's theory, hard work, responsibility and extra care would be punished, not rewarded, as they should be. This Court should send a clear message rejecting the reasoning espoused by the dissent below.

4. The Undisputed Evidence Demonstrates That *The New Yorker* Is Not Vicariously Liable For Malcolm's Actions.

As a last resort, Masson suggests that *The New Yorker* should be held vicariously liable for Malcolm's actions "[t]o the extent [she] can be considered an employee of *The New Yorker*." Ptnr. Br. at 47.[8] The undisputed facts, however, do not render Malcolm an employee under the doctrine of *respondeat superior*, and, as a matter of law, preclude a finding of vicarious liability. For example, as with the article at issue, Malcolm suggests articles which *The New Yorker* editors are free to reject, and is paid only at the completion of the work. (J.A. 244-45). She is not required to spend any amount of time working for *The New Yorker*, nor is she required to write anything for *The New Yorker*. The determination as to what, if anything, she writes, is solely hers, and the amount she is paid per article varies. (J.A. 245-246).

The test for imposing vicarious liability is whether the agent or employee is subject to the control of the principal or employer. *See Hunt* v. *Liberty Lobby*, 720 F.2d 631, 649 (11th Cir. 1983). This element of control is missing here. Plaintiff cites no case where the tenuous relationship between a writer and a publisher evidenced here resulted in an imposition of liability on the publisher. The prevailing case law is to the contrary.[9]

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8 Of course, as the district court held, *The New Yorker* cannot be held vicariously liable where the actions of Janet Malcolm, the alleged "employee," do not support a reasonable jury finding of actual malice.

9 *See, e.g., Martin Marietta Corp.*, 417 F. Supp. at 961 (newspaper not liable for actions of third party news service writer even where newspaper editor gave specifications for the article, permitted use of the newspaper's library and files for research, and compensated writer for the article).

D. No Liability May Be Imposed Upon Knopf.

With respect to the book publisher Knopf, plaintiff's claim is premised upon the insupportable argument that publishers are required to engage in substantial verification every time they receive a vague threat of a libel action—or else be guilty of "purposeful avoidance of the truth." *Harte-Hanks*, 109 S. Ct. at 2698. This is directly contrary to prevailing law and is especially inappropriate where, as here, the publisher merely was republishing an article written by a reliable author and previously reviewed by a respected publisher. As detailed below, Masson's vague and half-hearted indications of inaccuracies did not provide "obvious reasons" for Knopf to suspect falsity, and thus an obligation to investigate further. *St. Amant*, 390 U.S. at 732.

1. Knopf Placed Justifiable Reliance On A Respected Author and Publisher.

Knopf's reliance on two layers of reputable sources in the chain of publication strongly negates a claim of actual malice. Like *The New Yorker*, Knopf was entitled to rely on the strong reputation of Malcolm. Knopf also placed justifiable reliance on the equally strong reputation of *The New Yorker* for accuracy and on *The New Yorker* fact-checkers that reviewed the article before it was republished by Knopf. Similar factors were highlighted in *Herbert* v. *Lando*, 781 F.2d at 309 n.7: "Particularly relevant to the state of mind of the [magazine] editors in publishing the article was their knowledge that CBS had already determined the substance of Lando's report fit for publication."

In circumstances of republication in particular, the imposition upon publishers of a duty to verify is economically unrealistic and a true barrier to First Amendment freedoms. As the First Circuit has stated in this context:

> To require a book publisher to check, as a matter of course, every potentially defamatory reference might raise the price of nonfiction works beyond the resources of the average man. This result would, we think, pro-

> duce just such a chilling effect on the free flow of ideas as First Amendment jurisprudence has sought to avoid.

Geiger v. *Dell Publishing Co.*, 719 F.2d 515, 518 (1st Cir. 1983); *see also Weiner*, 74 N.Y.2d at 595, 549 N.E.2d at 457, 550 N.Y.S.2d at 255.

2. Masson's Vague Denial of Accuracy Created No Reason to Suspect Falsity.

Plaintiff's central argument is that Knopf harbored a high degree of awareness of probable falsity because it knew before publication of the book that plaintiff's lawyer had called *The New Yorker* to complain about inaccuracies in the article, and that Knopf's failure to verify the manuscript against the tapes therefore constituted willful blindness, and hence actual malice. Ptnr. Br. at 47; J.A. 224. Absent "obvious reasons" to suspect falsity, Knopf was under no obligation to investigate further. *St. Amant*, 390 U.S. at 732; *Reader's Digest Ass'n*, 37 Cal.3d at 258, 690 P.2d at 619, 208 Cal.Rptr. at 146. Under prevailing case law, the described phone call—which is the functional equivalent of a denial—in no way rises to the level of providing such "obvious reasons" as to suspect falsity. Of particular relevance, there is no record evidence that there was any mention in the telephone call of any specific complaints regarding particular quotations in the article. Nor is there any evidence that Masson regarded the issue seriously enough to send a written communication to *The New Yorker* or to Knopf in the several months between publication of the article and the book formally advising them of any alleged libel.

Such general denials of accuracy cannot create a duty for the publisher to investigate. As then-Circuit Judge Scalia, writing for the D.C. Circuit, ruled in the context of a letter received before publication alleging falsity, only disregard for *specific verifiable facts* contradicting the anticipated publication at issue suffices to indicate potential actual malice:

> [T]he letter as described could not conceivably constitute, in and of itself, sufficient evidence of malice to

> overcome a summary judgment motion. That effect might be achieved by a prior notice citing specific, verifiable facts contradicting the allegations so directly as to cause any reasonable person to conduct further inquiry; but mere general allegations of falsity similar to those contained in the complaint do not suffice.

Liberty Lobby, Inc. v. *Anderson*, 746 F.2d 1563, 1569 (D.C. Cir. 1984), *rev'd on other grounds*, 477 U.S. 242 (1986). Similarly in *Martin Marietta Corp.*, 417 F. Supp. at 960, where the plaintiff telephoned to accuse the newspaper of a false and defamatory publication after the first, but before the later, press runs, the court emphasized the "lack of detail provided in the denial" in determining that no actual malice existed with respect to any of the printings.

Further, a publisher can consider a plaintiff's litigious nature in deciding how much, if any, credibility to accord a plaintiff's complaints. *See Reader's Digest Ass'n*, 37 Cal.3d at 260, 690 P.2d at 620, 208 Cal.Rptr. at 147 (defendant's awareness that plaintiff's "legal department often used the courts to silence articles" weighs in favor of its discounting of plaintiff's warning). Here, plaintiff had sued his former colleague Dr. Eissler for libel—a fact contained in Malcolm's manuscript. (*See* J.A. 268-78). Moreover, Knopf knew from the manuscript of Masson's obstreperous and accusatory personality.

Finally, the very commonplace occurrence of denials and threats of libel litigation—and thus their diminished impact—has been acknowledged by this Court. The Court has relieved authors and publishers from a duty to accept " 'denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.' " *Harte-Hanks*, 109 S.Ct at 2698, n.37 (quoting *Edwards*, 556 F.2d at 121). Thus, "[t]he threat of a libel suit . . . might well give a publisher pause, but it would not necessarily lead it to doubt the truthfulness of its article or its sources." *Reader's Digest Ass'n*, 37 Cal.3d at 260, 690

P.2d at 620, 208 Cal.Rptr. at 147. *See also Rinaldi* v. *Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 383, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 952, *cert. denied*, 434 U.S. 969 (1977) ("That the articles drew criticism when originally published did not preclude a responsible publishing house from reprinting them.").

Given the very commonplace nature of vague threats of libel and broad denials of accuracy, a judicially-imposed burden of verification upon receiving such protests would impose enormous obstacles to the publication process and significantly diminish the volume and variety of materials which could be published. *See Curran* v. *Philadelphia Newspapers, Inc.*, 497 Pa. 163, 180, 439 A.2d 652, 660 (1981); *Martin Marietta Corp.*, 417 F. Supp. at 960.

Finally, in the instant case, Masson should be precluded from arguing as a litigation posture that Knopf in fact entertained doubts as to the truth of the alleged libelous statements when Masson himself stated at his deposition: "No, certainly I don't believe Mr. Gotlieb [sic] [Knopf's president], if he knew that they were false, would have gone ahead and published it. I think he was negligent in not finding out, but not dishonest." (J.A. 248).

II.

A MERE DENIAL OF THE AUTHENTICITY OF A WRITER'S NOTES SHOULD NOT BE SUFFICIENT FOR A COURT TO ASSUME FABRICATION

Two aspects of the decisions below, while couched in reference to Malcolm, have broad effect on all participants in the publishing process. First, a plaintiff's mere denial of the authenticity of a reporter's notes should not be sufficient for a court to assume fabrication under prevailing case law governing summary judgment. Rather, a plaintiff must adduce additional evidence sufficient to show that the notes are, in fact, fabricated. The decisions of the courts below, which fail to pursue a detailed analysis as to whether Masson made an

adequate showing, invite potential plaintiffs in future litigations to defeat summary judgment by making the all-too-facile charge that the author manufactured the notes. Very often writers have only handwritten notes, and no tape-recording. Were courts generally to adopt the near automatic acceptance of a plaintiff's allegation of fabrication as a disputed issue of fact, writers and publishers could be made to endure full-blown jury trials in each and every case where a writer relied upon notes. Moreover, the subjects of unfavorable portraits would easily be able to chill such publications with the mere threat of a charge of fabrication, since such a charge would result in a long and arduous trial. The Court did not intend such results in its recent pronouncements on summary judgment.

In *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), the Court stated: "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . ." Similarly, *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 256 (1986), made clear that a plaintiff may not defeat a defendant's properly supported motion for summary judgment in a libel case "by merely asserting that the jury might, and legally could, disbelieve the defendant's denial . . . of legal malice." The plaintiff must present "affirmative evidence" to defeat the motion. *Anderson*, 477 U.S. at 257. Only "justifiable" inferences are to be drawn in the plaintiff's favor. *Anderson*, 477 U.S. at 255. Accordingly, lower courts should engage in a meaningful case-by-case analysis to determine if sufficient evidence exists to suggest that the defendant's evidence is not to be believed, and, more particularly, to determine if notes are, in fact, fabricated.

Civil, as well as constitutional, notions support the concept that mere allegations of fabrication should be insufficient and that the courts should carefully examine the evidence proffered. A charge of fabrication of notes is analogous to a charge of common law fraud, and under the Federal Rules of Civil Procedure, in all averments of fraud, "the circum-

stances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). Without these threshold requirements, allegations of fraud or fabrication are simply too easy to make. The impetus behind Rule 9(b) applies in full force in this case.

III.

THE COURT SHOULD ADOPT THE INCREMENTAL HARM ANALYSIS AS OUTLINED IN *HERBERT* v. *LANDO*

Finally, *amici* encourage the Court to adopt the incremental harm analysis as applied by the Second Circuit in *Herbert* v. *Lando*, 781 F.2d at 309-12, which may be employed as a basis for affirming the Ninth Circuit's findings with regard to several quotes. The Second Circuit's holding that "statements—even those that might be found to have been published with actual malice—should not be actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery," 781 F.2d at 312, makes eminent good sense. In essence, a plaintiff should not be able to "nab" a publisher on a technicality when the "big picture" accurately reflects the state of affairs—as the Second Circuit aptly coined it, "a classic case of the tail wagging the dog." *Id*. The incremental harm analysis of *Herbert* is merely a logical outgrowth of the well-established notion that a court should look for substantial falsity—that is, it should examine a publication in its entirety, rather than sentences in isolation. While publishers plainly should not be granted the license to spin out fictional anecdotes or made-up remarks once a subject has displayed a certain proclivity, the carefully tailored test in *Herbert* renders highly unlikely that authors and publishers will consciously resort to fabrications. It also precludes damage awards only where no substantial harm

beyond that occasioned by the accurate materials has occurred.[10]

This case presents a situation where plaintiff's acknowledged quotations are so colorful that the alleged embellishments predominantly reinforce the prevalent themes in the article and are not so far from the "truth" as to be worthy of a libel judgment. Thus, considering the admittedly accurate statements made by Masson, the "intellectual gigolo" quote, for example, "impl[ies] the same view, and [is] simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery." *Herbert*, 781 F.2d at 312. Here, as in *Herbert*, any inferences that can be drawn from the "intellectual gigolo" and other quotes can equally be drawn from Masson's undisputed statements. *Herbert*, 781 F.2d at 312. Accordingly, the alleged misquotations should not be actionable.

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10 The D.C. Circuit's opinion in *Liberty Lobby, Inc.* v. *Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *rev'd on other grounds*, 477 U.S. 242 (1986), does not present a barrier to adoption of the *Herbert* standard. There, the court expressly stated that the defamatory statements at issue were *not* subsidiary to the non-actionable statements, but rather were statements further attacking the reputation of the plaintiff by creating inferences "quite separate and distinct from" inferences that were not actionable. *Liberty Lobby*, 746 F.2d at 1568, n.6. Neither of the California cases cited by plaintiffs addresses the propriety of an incremental harm analysis. Pltnr. Br. at 50. *Washburn* v. *Wright*, 261 Cal. App. 2d 789, 795, 68 Cal.Rptr. 224, 228 (1968), only establishes the unsurprising proposition that "a single sentence may be the basis for an action in libel even though buried in a much longer text." The other California case, *Baker* v. *Los Angeles Herald Examiner*, 42 Cal.3d 254, 261, 721 P.2d 87, 91, 228 Cal.Rptr. 206, 209 (1986), *cert. denied*, 107 S. Ct. 880 (1987), is similarly inapposite, and merely discusses the commonplace notion that a court should consider a publication "in its entirety."

CONCLUSION

For the reasons set forth above, the *amici* respectfully request that the decision below granting defendants' motion for summary judgment be affirmed.

Respectfully Submitted,

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